STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 22, 2009
v	No. 287998 Menominee Circuit Court
DEAN EWALD KORTH, Defendant-Appellant.	LC No. 08-003168-FH

Before: Hoekstra, P.J., and Bandstra and Servitto, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of armed robbery, MCL 750.529, based on an aiding and abetting theory, MCL 767.39. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 10 to 25 years' imprisonment. Because defendant's conviction is supported by sufficient evidence, we affirm defendant's conviction for armed robbery. However, because the trial court erred in sentencing defendant as a fourth habitual offender, we vacate defendant's sentence and remand for resentencing.

Defendant's conviction arose from a robbery that occurred at approximately 10:00 p.m. on March 20, 2005, near the night deposit box at River Valley State Bank in Menominee, Michigan. As the victim approached the deposit box, she heard a noise and was hit on her left shoulder. She heard someone demand the moneybag she was carrying. The victim turned around to see her assailant, later identified as defendant's roommate, Robert McCarty, holding a stick. McCarty pushed the victim to the ground and ran away with the bag. The victim found the black handle of a window washer at the scene, and believed McCarty hit her on the shoulder with the handle.[1] In a letter to the trial court, defendant admitted the armed robbery was his idea and that he drove McCarty to the bank and gave him the window washer handle.

I. Sufficiency of the Evidence

Defendant argues there was insufficient evidence to sustain his conviction. Specifically, defendant claims that a handle of a window washer is not a per se dangerous weapon and there was no evidence to suggest that McCarty used the handle in a manner to lead the victim to

[1] McCarty pleaded guilty to unarmed robbery.

believe that it was a dangerous weapon. We review a claim of insufficient evidence de novo, examining the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). Circumstantial evidence and the reasonable inferences arising from the evidence can constitute satisfactory proof of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

To establish the elements of armed robbery, MCL 750.529, the prosecutor must prove:

> (1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon. [*People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007).]

"'To constitute armed robbery the robber must be armed with an article which is in fact a dangerous weapon—a gun, knife, bludgeon, etc., or some article harmless in itself, but used or fashioned in a manner to induce the reasonable belief that the article is a dangerous weapon.'" *People v Banks*, 454 Mich 469, 473; 563 NW2d 200 (1997), quoting *People v Parker*, 417 Mich 556, 565; 339 NW2d 455 (1983).

Here, the victim stood outside a bank at about 10:00 p.m., holding a moneybag, when McCarty struck her from behind and demanded the bag. The victim turned around and observed McCarty holding a stick. McCarty then forced the victim to the ground. Under these facts, a rational trier of fact could find beyond a reasonable doubt that McCarty fashioned the window washer stick in a manner to lead the victim to reasonably believe that the stick was a dangerous weapon. *Hawkins*, *supra*; *Chambers*, *supra*. Defendant's conviction is supported by sufficient evidence.

II. Sentencing Issues

Defendant argues that the trial court improperly sentenced him as a fourth habitual offender. According to defendant, because only one of his other three convictions occurred before March 20, 2005, the date of the armed robbery, the trial court could have only sentenced him as a second habitual offender.

Plaintiff concedes that the trial court erred in sentencing defendant under MCL 769.12 as a fourth habitual offender. The trial court could not sentence defendant under MCL 769.12 because defendant did not aid and abet the armed robbery "subsequent" to having "been convicted of any combination of 3 or more felonies." MCL 769.12(1); see also *People v*

Sanders, 91 Mich App 737, 744; 283 NW2d 841 (1979). We, therefore, vacate defendant's sentence and remand for resentencing.[2]

We address defendant's remaining two sentencing arguments in the event defendant raises the arguments at resentencing.

Defendant argues that the trial court erred in scoring ten points for offense variable (OV) 4, MCL 777.34. A scoring decision for which there is any evidence in support will be upheld. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009).

Ten points may be scored for OV 4 if a victim suffered "[s]erious psychological injury requiring professional treatment." MCL 777.34(1)(a). However, "the fact that treatment has not been sought is not conclusive." MCL 777.34(2). The victim reported that she was "extremely fearful and no longer comfortable leaving work," that "she is always looking over her shoulder and has lost her freedom of being able to leave the restaurant without fear of this incident recurring," and that she was "extremely distraught over this incident." These reports by the victim are evidence that she suffered serious psychological harm. The trial court's scoring of OV 4 was supported by evidence in the record.

Defendant also claims that he is entitled to an additional 255 days credit for time served from July 6, 2007, the date he claims the prosecution secured his statement that he authored letters admitting his involvement in the armed robbery, to March 17, 2008, the date he was arrested for the armed robbery. We review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant does not claim that he is entitled to an additional 255 days credit under the jail credit statute, MCL 769.11b. Rather, he claims that, because the prosecutor improperly delayed arresting him for the armed robbery, due process entitles him to the additional days credit. In *People v Adkins*, 433 Mich 732, 750; 449 NW2d 400 (1989), our Supreme Court left open the question whether a defendant is entitled to jail credit when the prosecutor fails to swiftly prosecute the defendant. Defendant relies on *People v Parshay*, 104 Mich App 411; 304 NW2d 593 (1981), to establish that the question left unanswered in *Adkins* must be answered in the affirmative. However, the Court's analysis in *Parshay* revolved around a liberal construction of MCL 769.11b, which the Supreme Court has rejected, see *People v Prieskorn*, 424 Mich 327; 381 NW2d 646 (1985), not due process. Accordingly, defendant has failed to establish that the trial court plainly erred in not awarding him an additional 255 days credit.

[2] Our decision to vacate defendant's sentence and remand for resentencing places this case in a presentence posture. *People v Ezell*, 446 Mich 869; 522 NW2d 632 (1994). Accordingly, at resentencing, the trial court may rescore the prior record variables and the offense variables.

We affirm defendant's conviction, but vacate his sentence and remand for resentencing. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Deborah A. Servitto